Office - Supreme Court, U.S.
FILED
OCT 23 1982
ALEXANDER L. STEVAS,
CLERK

82-730

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ALEXANDER F. EAGLE,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

and

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
a corporation,
Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM L. KNECHT
524 - 23rd Street
Oakland, CA 94612
(415) 444-4628

SAMUEL L. HOLMES
COUNSEL OF RECORD
ANGELL, HOLMES & LEA
Suite 1400
115 Sansome Street
San Francisco, CA 94104
(415) 981-1050

Attorneys for Petitioner,
Alexander F. Eagle

QUESTION PRESENTED.

Is a court of appeals required to use its power to order a district court to remand to a state court, for lack of jurisdiction, a proposed class action brought by one minority shareholder, based on state law, against the majority shareholder of a corporation for breach of fiduciary duty, where the damages suffered by most class members is less than $10,000 each and the district court, after removal of the action as a diversity of citizenship case, has refused to remand?

TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 2

Questions Presented. 3

Statutes Involved. 3

Statement of the Case. 3

Reasons for Granting the Writ. . . . 10

1. Where a district court lacks original jurisdiction, but refuses to remand after removal from a state court, a court of appeals is not compelled by Ex Parte Harding to deny a writ of mandamus requiring the district court to remand 10

2. There is no diversity jurisdiction unless plaintiff and every other class member has a claim in the jurisdictional amount, without aggregation . 19

Conclusion 24

TABLE OF AUTHORITIES CITED

Cases

Page

American Fire & Casualty Co. v. Finn (1951) 341 U.S. 6 16

De Beers Consolidated Mines, Ltd. v. U.S. (1945) 325 U.S. 212 15

Ex Parte Harding (1911) 219 U.S. 363 . . . . . Passim

Giesecke v. Denver Tramway Corp. (DCDel. 1949) 81 F.Supp. 957 23

Goldberg v. CPC Financial, Inc. (CA9 1982) 678 F.2d 1365 9

Jones v. H. F. Ahmanson & Co. (1969) 1 C.3d 93. . . . . 20, 21, 22, 24, 25

La Buy v. Howes Leather Co. (1957) 352 U.S. 249. . . . . 15, 17

Roche v. Evaporated Milk Association (1943) 319 U.S. 21 15

Schlagenhauf v. Holder (1964) 379 U.S. 104 15

Snow v. Ford Motor Co. (CA9 1977) 561 F.2d 787. . . . . 23, 26

Snyder v. Harris (1969) 394 U.S. 332 . . . . . 20, 24, 25

Virginia v. Rives (1880) 100 U.S. 313, Restated at 219 U.S. 373 25

TABLE OF AUTHORITIES CITED

Cases

Page

Will v. United States (1967)
389 U.S. 90 . . . . . .14, 15, 18

Statutes

28 U.S. Code §1254(1) 2

28 U.S. Code §1292(b) 8, 17

28 U.S. Code §1332. . . . . 3, 25

28 U.S. Code §1441(a) 3

28 U.S. Code §1447(c) 3

28 U.S. Code §1651. . . . . 3, 10, 12

No.

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1982

ALEXANDER F. EAGLE,

PETITIONER,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

RESPONDENT,

and

AMERICAN TELEPHONE & TELEGRAPH COMPANY, a corporation

REAL PARTY IN INTEREST.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit entered in the above case on August 26, 1982, denying a petition for a writ of mandamus.

OPINIONS BELOW.

The order of the Ninth Circuit Court of Appeals is unreported and is printed in Appendix B hereof, infra, page 4. The orders of the District Court for the Northern District of California are unreported and are printed in Appendix B, pages 1, 2 and 3.

JURISDICTION.

The order of the Circuit Court of Appeals was entered on August 26, 1982. The jurisdiction of this court is invoked under 28 U.S. Code §1254(1).

QUESTION PRESENTED.

Is a court of appeals required to use its power to order a district court to remand to a state court, for lack of jurisdiction, a proposed class action brought by one minority shareholder, based on state law, against the majority shareholder of a corporation for breach of fiduciary duty, where the damages suffered by most class members is less than $10,000 each and the district court, after removal of the action as a diversity of citizenship case, has refused to remand?

STATUTES INVOLVED.

The statutory provisions involved are 28 U.S. Code §1332, §1441(a), §1447(c), and §1651.

STATEMENT OF THE CASE.

Petitioner's complaint for damages as a minority shareholder against Real Party in Interest (hereafter

American) as majority shareholder (owning over 90%) of the common shares of Pacific Telephone and Telegraph Company was filed in a California Superior Court on September 11, 1981. In the complaint Petitioner alleged that American elected all the directors of Pacific and, through them, all of Pacific's officers and made all of Pacific's policy decisions. Among those decisions was the deliberate choice of Pacific not to claim federal income tax deductions for accelerated depreciation and investment tax credits. The choice was made for the benefit of American, not Pacific, and injured the minority shareholders, because the California Public Utilities Commission by a final order on February 13, 1980, required Pacific to refund to its subscribers the sum of $381,000,000 plus interest, thus reducing the amounts otherwise available

to pay dividends to Petitioner and the other shareholders or to enhance the net worth or underlying value of their shares. The complaint contained the usual class action allegations, but the class has not yet been certified.

On or about October 13, 1981, American filed its petition for removal of the action to the District Court and answered the complaint, denying that a class action was properly brought and denying the allegations of wrongdoing, but admitting that it elected the directors of Pacific and that the California Public Utilities Commission had issued the refund order. Other defenses such as the statute of limitations, laches, lack of standing to sue and failure to state a claim were also alleged.

Petitioner moved to remand the action to the State court on the ground

that jurisdiction of the District Court could be based only on 28 U.S. Code §1332 as a diversity of citizenship action, and that in such an action the claim of each and every individual member of the class must exceed $10,000, a requirement not met even as to Petitioner himself (or even Petitioner or his wife for their shares held in community property). In a supporting affidavit Petitioner showed that 90% of the intended class members had claims of less than $2,000 each.

The District Court issued its order denying the motion to remand on November 20, 1981. Thereafter Petitioner filed an amended complaint essentially the same as the first complaint, but adding the allegation that on or about October 26, 1981, American had offered to purchase the shares of Pacific owned by Petitioner and the members of the class, that

American, through a wholly-owned subsidiary, had filed an application with the California PUC for a merger, that the relief sought was not available through the PUC proceedings, and the wrong could be remedied only through the pending action. American filed an answer substantially the same as its answer to the original complaint. It admitted an offer to buy the shares in Pacific owned by the minority shareholders and the PUC application. The other defenses pleaded were substantially the same.

On January 25, 1982, Petitioner's second motion for a remand was denied on the ground that the jurisdiction was determined with reference to the pleadings as they stood at the time of the petition for removal and that a subsequent amendment could have no affect on jurisdiction.

Petitioner moved for orders to rescind, annul or withdraw the order of denial of remand and issuance of an amended order permitting an immediate appeal under 28 U.S.C. §1292(b) so that the question of jurisdiction could be resolved before the time, expense and effort of a costly trial (and probable appeal) were undertaken. On February 12, 1982, the District Court denied the motion to amend its prior order and the motion for an order permitting an appeal.

On April 14, 1982, Petitioner filed with the Ninth Circuit Court of Appeals a petition for a writ of mandamus to compel the District Court to remand the action to the State Court. On May 17 the Ninth Circuit Court of Appeals issued its order requiring that an answer to the petition be filed by American, followed by American's brief and a reply by

Petitioner.

On August 26, 1982, the Court of Appeals issued its order denying the petition for a writ of mandamus "under compulsion of Ex parte Harding, 219 U.S. 363 (1911)." The court said that the denial was without prejudice for motion for reconsideration of the order denying remand in the light of Goldberg v. CPC Financial, Inc. (CA9 1982) 678 F.2d 1365. No motion for reconsideration was made because of the statement of the District Court at a status conference that the motion would be denied because in the opinion of the Court there was only a single cause of action for Petitioner and all of the other members of the class.

The Goldberg case is the subject of a pending petition for a writ of certiori. It would be appropriate to consider this case and the Goldberg

decision together.

REASONS FOR GRANTING THE WRIT.

1. Where a district court lacks original jurisdiction, but refuses to remand after removal from a state court, a court of appeals is not compelled by Ex parte Harding to deny a writ of mandamus requiring the district court to remand.

The Circuit Court stated that the petition for writ of mandamus in this matter was denied because "under compulsion of Ex Parte Harding 219 U.S. 363 (1911), we have no authority to issue the writ in these circumstances."

Such a rigid application of Harding conflicts with 28 U.S. Code §1651, with Appellate Rule 21 and with a substantial body of case law including decisions of the Ninth Circuit itself. The All Writs Statute, 28 U.S.C. §1651(a), provides: "The Supreme Court and all

courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages of principles of law." An important purpose of that statute, is to allow review of a nonappealable order, a category which includes the denial of a remand.

Appellate Rule 21(a) provides: "Application for a writ of mandamus of a prohibition directed to a judge or judges shall be made by filing a petition therefor with the Clerk of the Court of Appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court." If a circuit court has no power to grant mandamus, there is no reason for this rule.

The circuit courts of appeals, being courts established by Act of

Congress, have the statutory authority to grant writs of mandamus under 28 U.S.C. §1651. Therefore, if the Ninth Circuit Court of Appeals thought it lacked authority under any circumstances, it was obviously wrong. However, its order was a conditional denial. It said it had no authority to issue the writ "in these circumstances." Hence, the circumstances to which Harding applies must be definitively stated because the narrow interpretation assumed by the Ninth Circuit, viz., a total lack of power to issue a writ of mandamus to compel a remand even though there is no federal diversity jurisdiction, is contrary to the principal authorities and to Harding itself.

The circumstances which, under the All Writs Statute and more recent decisions than Harding, determine the

matter, namely, the absence of original jurisdiction and the egregious waste of compelling the Petitioner to undertake a lenthy and costly trial and appeal proceeding in order to get a final ruling or jurisdiction, are present. Those circumstances have allowed other courts of appeals to exercise the authority which the Ninth Circuit says it does not have.

The particular circumstances which the Circuit Court felt compelled it to deny its power were not explicated, but, since the issue is jurisdiction, it had to revise Harding in contradiction to the current law to reach its result. It must be brought into line with more recent cases and the limitations of diversity jurisdiction. Harding, as interpreted in this case, is inconsistent with many cases which allowed mandamus in aid of jurisdiction or preservation of its

mistaken use.

If a court of appeals can use mandamus to aid jurisdiction, it has the power to prevent the usurpation of jurisdiction which does not lawfully exist. It follows that, where the District Court in this case erroneously denied a motion for remand and improvidently denied permission for a interlocutory appeal, the case falls within the scope of the "exceptional circumstance" of lack of jurisdiction requiring mandamus.

The Court of Appeals has interpreted Harding to mean something different, from such cases as Will v. United States (1967) 389 U.S. 90. It was there held that the traditional use of mandamus has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction, citing Roche v.

Evaporated Milk Association (1943) 319 U.S. 21. Then it was said that the exceptional circumstances permitting the invocation of the extraordinary writ consist of a judicial usurpation of power, citing De Beers Consolidated Mines, Ltd. v. U.S. (1945) 325 U.S. 212.

In addition to its uses to prevent the exercise of nonexistent jurisdiction and to compel the use existing jurisdiction, mandamus is an instrument to promote economical and orderly administration of justice, a supervisory function of the appellate court, recognized in La Buy v. Howes Leather Co. (1957) 352 U.S. 249, 259-260, in Schlagenhauf v. Holder (1964) 379 U.S. 104, and in Will, supra, The courts of appeals have a power corresponding to the power of the Supreme Court to determine immediately questions relating to the

orderly, even and efficient administration of the judicial system. Mandamus is the method of avoiding the absurd consequence of American Fire & Casualty Co v. Finn (1951) 341 U.S. 6. That case had been improperly removed by a district court having no original jurisdiction. The case was tried to judgment. Then the defendant who had removed the case challenged the final judgment on the ground of lack of jurisdiction. Such an incredibly wasteful imposition on the judicial system and gross unfairness to the plaintiff could occur in this case by allowing the most powerful corporation in the nation to grind small stockholders through needless, costly and lengthy proceedings, only to face a jurisdictional challenge at what should be the end of the case. The only way to avoid such injustice is to liberate the Court of Appeals from its mistaken

interpretation of Harding and to declare that it has the duty to exercise its authority to grant mandamus.

A proper method of resolving the issue would have been an interlocutory appeal under 28 USC §1292(b). Petitioner attempted it, but was denied permission by the District Court. That but was denied the privilege. That fact is significant because several courts have suggested that §1292(b) certification should be sought before resort is had to mandamus.

An inexorable rule that only final jdugments are appealable can work injustices and increase the caseload burden of the federal system unnecessarily, while members of the judiciary are crying out for relief. Such rigidity interferes with the "proper judicial administration in the federal system." (La Buy v. Howes Leather Co.,

supra. That is why extraordinary writs have historically been essential to the federal judicial system, even where there is jurisdiction.

The reconciliation of the use of mandamus for immediate review with the policy against piecemeal appeals was boiled down to the question of exceptional circumstances in the concurring opinion in Will v. United States 389 U.S. at 108:

> "I . . . realize that sometimes the granting of mandamus may bring about the review of a case as would an appeal. Yet this does not deprive a court of its power to issue the writ . . . [T]he issuance of the writ of mandamus is proper where a court finds exceptional circumstances to support such an order."

Whether it be the prevention of the usurpation of judisdiction by the

District Court or the wastefulness of deferring a determination of jurisdiction, the proper and efficient administration of the judicial system requires that the exceptional circumstances for the issuance of a writ of mandamus be explicated and the error of the Court of Appeals in denying its own power by a mistaken interpretation of Harding be corrected.

2. There is no diversity jurisdiction unless plaintiff and every other class member has a claim in the jurisdictional amount, without aggregation.

At this time Petitioner is the only party seeking relief, no class certification having been requested. Under Rule 23 of the Federal Rules of Civil Procedure a class certification may be sought, but the character of the rights of the class members determines whether

the requirements of diversity jurisdiction are met. "Character of the rights" is not the same as "common issues of law and fact" which govern class actions. In the absence of a single, indivisible right, which can be sued on only once, the members of the class cannot aggregate their claims to satisfy the jurisdictional amount. That was decided in Snyder v. Harris (1969) 394 U.S. 332. If they cannot aggregate, each claim must meet the minimum jurisdictional amount.

Since aggregation is not permitted, the question is whether there is only one claim, making aggregation necessary. That depends on its jural nature. Petitioner's claim herein is based on California law, particularly Jones v. H.F. Ahmanson & Co. (1969) 1 C.3d 93. At pages 106-7, the California Supreme Court distinguished carefully

between a derivative action brought on behalf of a corporation for the benefit of shareholders and the personal action of a shareholder brought for his own benefit. The latter action need not be unique and may be similar to or affect the rights of other shareholders, but it is not brought for them or for the benefit of the corporation. In Ahmanson the plaintiff sought damages (and other relief) for losses suffered as a minority shareholder because of breaches of fiduciary responsibilities by the defendants, who were the majority shareholders. The court recognized that an action lay for the damage suffered by the minority shareholders directly, saying, at 107:

> "It is clear from the stipulated facts and plaintiff's allegations that she does not seek to recover on behalf of the corporation for injury done to the

corporation by defendants. Although she does allege that the value of her stock has been diminished by defendants' actions, she does not contend that the diminished value reflects an injury to the corporation and resultant depreciation in the value of the stock. Thus the gravamen of her cause of action is injury to herself and the other minority shareholders.

"* * *The individual wrong necessary to support an action by a shareholder need not be unique to that plaintiff. The same injury may affect a substantial number of shareholders. If the injury is not incidental to an injury to the corporation, an individual cause of action exists." (Emphasis supplied)

The manner in which the damages of individual shareholders will be measured is not the test of the nature of the right. Potential dividends do not indicate a common or single right which would satisfy the jurisdictional amount on a collective basis. Giesecke v. Denver Tramway Corp. (DCDel. 1949) 81 F.Supp. 957. The case was decided under old Rule 23, but the same concept applies under the current rule.

The total detriment or monetary impact on the defendant, even though the judgment produces a fund out of which the class members are distributed shares, does not provide a basis for aggregation of their claims or the coelescence of their claims into a single right. Snow v. Ford Motor Co. (CA9 1977) 561 F.2d 787.

In this case the Petitioner could proceed without seeking certification of

the class or he could proceed even if certification were denied. That circumstance alone, permissible under Ahmanson, action is based, shows that he has an individual cause of action. If he has an individual cause of action, so does every other class member. Therefore, under Snyder, the claims cannot be aggregated and the federal court has no jurisdiction because 90% of the class members do not meet the jurisdictional minimum.

CONCLUSION

The overly simplified headnote of Harding has been literally applied by the Court of Appeals. By doing do, it has overextended Harding, abolished the exception that Harding itself preserved, and brought itself into conflict with other circuits and decisions of its own. Harding specifically reaffirmed the

doctrine of Virginia v. Rives (1880) 100 U.S. 313, 25 L.Ed. 667, which is restated at 219 U.S. 373: '"It [mandamus] does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed."' (Emphasis supplied)

In this case the District Court lacked original jurisdiction because Petitioner's claim is less than the amount required for diversity jurisdiction (under 28 U.S.C. §1332), his claim is personal and not a share in a sinngle claim jointly owned by all minority shareholders (under Ahmanson) and his and the other shareholders' claims cannot be aggregated (under Snyder). Since the District Court can exercise jurisdiction over a removed

action only if it would have had jurisdiction had the case been originally brought there by Petitioner (Snow v. Ford Motor Co., supra, 561 F.2d at 789), there is no jurisdiction at this time. Therefore, even under Harding when properly read and applied, due to the lack of jurisdiction the foreseeable needless waste occasioned by deferring the issue until an appeal after judgment, remand should have been granted. The Court of Appeal's disclaimer of authority to grant it has created uncertainty in the law which should be corrected by this Court.

Dated: October 22, 1982.

Respectfully submitted,

William L. Knecht

WILLIAM L. KNECHT

SAMUEL L. HOLMES
(Counsel of Record)
ANGELL, HOLMES & LEA

ATTORNEYS FOR PETITIONER
ALEXANDER F. EAGLE

(Appendices follow)